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New Approaches to the Protection of Human Rights Statement by the CHRC Chief Commissioner

New Approaches to the Protection of Human Rights
Statement by Mrs. Mary Gusella, Chief Commissioner Canadian Human Rights Commission
- to the -
Canadian Association of Statutory Human Rights Agencies
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Let me start with some facts. This year the Canadian Human Rights Commission is twenty-five years old. It is facing significantly more demands, and facing significantly different demands, than when it was first created in 1978. In 2002, the number of signed complaints went up by 39%, from 574 to 800. Our projections for 2003 show that this number could rise even higher, to as many as 950 signed complaints. Some categories of complaints have risen even more sharply - for instance complaints citing disability rose by 85% last year. At the same time as cases are increasing, budgets are not. The situation is unsustainable and it is clear that new approaches are needed.

However, before I begin to speak about new approaches to human rights - the title of this panel - I will speak of some old approaches. Or more precisely, before I talk about new directions at the Canadian Human Rights Commission, allow me to speak briefly of the past twenty-five years which have led the Canadian Human Rights Commission to where it is today.

Since 1977 when the Canadian Human Rights Act was passed, the human rights landscape has changed considerably in a number of ways:

- Although discrimination is still at the forefront of Canadians' human rights concerns, it has become more complex and more subtle.
- Human rights law and practice have evolved to recognize that inequality arises not only from prejudice but also from the discriminatory impacts of ordinary policies and practices.
- While individuals still experience discrimination and still deserve remedies, we also know now that we miss most of the picture if we focus solely on individuals - some types of discrimination only become apparent when we look at ongoing patterns of inequality for groups.
- Demographic changes in Canada, for instance a higher proportion of visible minorities, a burgeoning young aboriginal population and a general population which is aging, have also had an impact on the types of human rights issues coming to the fore and the demands placed on human rights institutions.

At the same time as the human rights landscape has changed, our Act and our human rights institutional framework have remained largely as they were in 1977. The same institutions - the Commission, the Human Rights Tribunal and the courts - are still there and all still have roughly the same tools to deal with what have become very different human rights challenges. Compounding the situation is the fact that the relative balance among these human rights institutions has shifted over the years. Let me explain. At its origin in 1978, the Canadian Human Rights Act was remedial, aimed not only at deterring offenders but at encouraging compliance. The Commission was given the power, in addition to the individual complaints function, to conduct research, foster greater understanding of discrimination and educate the public about equality. In fact, in submitting the draft Human Rights Act to Parliament in 1977, the government of the day said that "the functions of the Commission reflect the experience of the provinces and other jurisdictions that a conciliatory approach, developed by a body with specialized knowledge in the area of human rights is the most successful way to deal with problems arising from discriminatory practices"

Parliament did a good job when it crafted the Canadian Human Rights Act. The legislation was intentionally made to be flexible and give the Commission a full range of tools to adapt to new circumstances and changing demands.

However over the years, due to resource constraints and judicial decisions, the CHRC has been pushed away from its administrative, remedial roots towards the enforcement end of the continuum, focussing more on investigation and litigation to resolve human rights disputes. In doing so, in some respects the courts have shifted the balance found in the Canadian Human Rights Act between private and public interests in favour of private interests.

A system that focusses mostly on a litigious approach can foster societal brittleness by creating "winners" and "losers". Especially in cases of systemic discrimination, an adversarial process which focusses solely on individual remedies, is even less effective. As the Black Report on reform of the B.C. human rights system said, "changing systemic patterns of inequality is the most important purpose of a human rights statute". In many ways the human rights system has strayed from this original intent and has not met the full potential and range of the Canadian Human Rights Act.

Most of the resources are consumed in the processing of individual complaints. If the only objective of the human rights system were to provide a remedy to the individual, some of these problems would be less serious. But a key objective of the human rights system is to change persistent patterns of inequality. In effect, a complaints-based system means that the priorities of human rights commissions are set by those complainants who choose to come in the door. And the people who experience the most significant inequality often do not file complaints – at times because past discrimination, poverty and poor education have often deprived them of the skills needed to use the complaint process.

As a result of the over-judicialization of the process and the primary focus on individual complaints, human rights commissions are criticized for spending too much time on relatively minor instances of discrimination even though the type of complaints filed is largely beyond their control. As Justice Rosalie Abella said in her Royal Commission report on Equality in Employment, "resolving discrimination... on a case by case basis puts human rights commissions in the position of stamping out brush fires when the urgency is in the incendiary potential of the whole forest."

An Agenda for Quantum Change

It is clear that the current human rights system needs to change. And it needs to change in fundamental ways. That is why the Canadian Human Rights Commission, the federal government and almost all other provincial commissions and governments have, in the past few years, undertaken reviews of human rights commissions legislation, procedures or mandates. The challenge for the Canadian Human Rights Commission, in fact for all of us, is to determine what direction change should take, and in what spirit and vision.

Let us step back and look at the original purposes of human rights commissions. Drawing from human rights legislation across the country, reports from the various review panels including the federal review panel, the Black and Cornish Reports, we can perhaps summarize by saying that human rights commissions are there to:

- correct persistent patterns of inequality
- redress discrimination against individuals
- prevent discrimination before it occurs (an effective strategy to eliminate both individual and systemic

discrimination cannot rely entirely on legal remedies for past discrimination)

- Commissions also are there to provide an effective, expeditious remedy through a fair process. When prevention fails and legal intervention is required, it must be effective. It must also be prompt; delays allow discrimination to fester and decrease the chance of finding a solution. Fairness is essential, not only because it is an important right in itself but because human rights litigation is unlikely to result in changes if all sides do not have confidence in the fairness of the process.
- Finally, the human rights system must serve to identify emerging issues or it will fail over the long run.

We know that the current system does not measure up against these objectives. That is why, over the past eight months, the Commission has been working hard to re-engineer its human rights management system.

In our view, simple demands for more resources so we can apply more of the same procedures in the same way to this growing caseload will not resolve the issues facing the Commission and other parts of the federal human rights system. We need to fundamentally rethink our complaint process to ensure we do not fix one backlog only to find ourselves facing another.

To develop our package of improvements, we have looked at our enabling legislation, reviewed the federal review panel report as well as reports on Commission reform from other jurisdictions, canvassed the experiences of other human rights commissions and listened to Commission staff.

We have also looked at innovative thinking from other disciplines to bring new perspectives to our work. In fact, governments at all levels are seeing this at work in virtually every area of public policy. Human rights management structures should be no different. Canadians expect the services for which they pay to be effective, efficient, timely and fair. The current model, which is essentially a model of litigation and conflict, is and always will be incapable of satisfying this legitimate demand of Canadians.

To respond, we are taking a focussed management approach that entails a client-centred, results-oriented set of principles and applies them to the human rights system. The Commission's new model therefore aims at realigning the imbalance in the current system and focussing our efforts on mediation and prevention.

Mediation

Mediation is being used to great effect by other administrative bodies in Canada. Increasingly, administrative decision-makers across the country are turning to non-adversarial means and a more comprehensive approach - an approach which explicitly acknowledges - in legislation and in practice - that an emphasis on education and voluntary compliance can limit the need for contested proceedings.

Mediation has enormous potential to resolve most complaints of discrimination. In those cases where alternative dispute resolution might not be appropriate, either because of the type of discrimination involved, a serious imbalance of power between the parties or because the remedy requires legislative change, then the Commission can still send a case straight to investigation and to Tribunal.

But in the majority of cases, mediation offers a non-adversarial context in which the parties can get beyond positions of right and wrong and address the needs and interests that are key to finding a solution. Mediation is a more humane approach: it promotes understanding between the parties and has the power to heal, something of particular value where the relationship between the parties is ongoing. Mediation also has the advantage of working relatively quickly, in contrast to investigation and litigation, so that victims of discrimination receive a remedy without delay.

Finally, mediation also has the advantage of being more cost-effective and timely than the traditional process of investigation and litigation. The savings in time, client angst and cost to the taxpayer are enormous. Whereas the traditional system has historically taken two years on average at the Commission, mediation techniques can reduce this to as little as four to six months. Moreover, mediation can be a unique opportunity for education, awareness and commitment to a humane workplace. In beefing-up our Alternative Dispute Resolution program, we are focussing our resources on the front of the case management process and away from the back; i.e. we are redeploying resources to

address cases earlier and faster and offering mediation services to clients at any point in the case process.

I have been engaging large federal employers in discussions to increase their willingness to use mediation. In order to ensure the integrity of our approach, I have created an advisory committee composed of four eminent jurists who will advise on our mediation principles and practices to ensure we apply the highest human rights standards. I am please to announce that Justices Gérard La Forest, Claire L'Heureux-Dubé, Charles Dubin and Roger Kerans have agreed to sit on the newly formed Canadian Human Rights Commission Advisory Council. Their contribution to the progressive reform of the Commission's processes and efforts to maximize the human rights impact of its work will be invaluable.

Serving the Public Interest: Reform of the Complaint Process and Alternatives to the Complaint Process

While we are increasing our focus on alternative dispute resolution, we also recognize that there will always be a place for the traditional model of investigation and litigation. Some cases can only be resolved through litigation. In other cases, for instance where the resolution of a case might bring about a change in the law or result in policies that will affect many people, litigation may be the optimal route to effect societal change.

But investigation and litigation are blunt instruments. Some systemic issues are better suited to non-complaints processes and the Commission is developing new tools outside of the complaints system, such as public reports and policy inquiries, to respond to systemic human rights issues, identify their root causes and make recommendations for change. More research, public dialogue education and awareness are also key to addressing systemic discrimination.

Even within the complaints system, the different stages of complaint processing should not necessarily be approached in exactly the same way for all cases, regardless of their complexity or substance. We are developing an approach which allows us to triage complaints early in the complaint process to pick out those cases which raise broad public interest issues. While there is a clear public interest in the resolution of every individual complaint of discrimination, it is also clear that some cases raise broader human rights issues than others, for instance by changing policies, programs, laws or cultures affecting entire workplaces. Other cases hinge more on resolving issues between the parties and ensuring a remedy for individual acts of discrimination. We can say that these latter cases fall closer to the "private justice" end of the continuum of cases. In sum, while there is an equality interest in all cases of discrimination, all discrimination cases are not created equal.

If a case raises broad public interest concerns, then we may take a different approach to it – for example, tailoring our approach at the alternative dispute resolution phase; or, if the case centers on legal arguments and the facts are clear, sending it straight to Tribunal. These are just two examples of different ways in which we can approach complaints which raise broad public interest concerns within the complaints stream. And while we will continue to ensure that standards of procedural fairness are met in the processing of all complaints, it is clear that a 'one-size fits all' approach is no longer tenable. Nor does it serve the interests of Canadians in ensuring a Commission capable of identifying and focussing its efforts on those cases which will have the greatest human rights impact.

Serving the public interest also requires not only an individual complaint process which can respond to systemic issues, it also requires a process which is timely, efficient and effective for all cases. At the CHRC, as at provincial commissions and elsewhere, the litigious model adopted over the years by the Commission has become infinitely complex, time consuming and costly. Increasingly, complaint processing, including hearings of the Tribunal, turns not on the facts of the case but on matters of procedure. While it is true that procedural fairness is an important element of justice, it is also true that justice delayed is justice denied. If human rights claimants have to wait on average two years to have their complaint resolved, this is a serious justice problem as well.

The Commission is devoting resources to reduce the excess number of cases in the system as quickly as possible. But additional resources alone are not the answer. The complaint process needs to be transformed if the Commission is to deal with complaints more expeditiously.

The Commission therefore has a dual challenge facing it: to make the complaint process more efficient, but also to make it more effective by maximizing its human rights impact. Our model for change contemplates reform in all aspects of the Commission's work in order to meet this dual challenge.

At the intake stage we are introducing a new system which will afford complainants greater ownership of their own complaints by setting out their own particulars. The new intake system will also permit the Commission to apply its human rights expertise in developing the theory of the case from the start while preserving its objectivity.

At the triage and investigation stages we are creating multidisciplinary teams composed of investigators, legal staff and policy analysts to ensure investigations are focussed on the issues at the heart of the complaint and that a tailored approach can be taken and a determination made as early as possible on the best direction for that particular case.

When the Commission refers cases to Tribunal, the Commission is adapting its procedure to ensure its statutory mandate to represent the public interest before Tribunal is more clearly met. In those cases which raise broad public interests, for instance cases which will change the law, policies or address significant and pressing human rights issues, the Commission will be there in force. In those cases where private interests can be said to predominate, then the Commission will continue to be present at Tribunal but in a more focussed way - emphasizing the elements of the case which engage the interest of the public in ensuring that all cases of discrimination are resolved. In such cases, Commission participation can take the form of oral submissions outlining the legal and factual issues raised by the case in question, written arguments focussing on specific legal aspects of the case or leading evidence on specific aspects of the case which engage the public interest. This new approach we consider more in keeping with the role of representing the public interest set out in the Canadian Human Rights Act than under the current system where we are often mistaken for complainant's counsel.

Let me emphasize that the Commission will continue to be at Tribunal in all cases referred. We also expect that the number of cases in which the Commission will be at Tribunal in full force, with participation throughout the length of the hearing, will be as many or more than in the past. The challenge we are facing is that, in order to deal with the backlog, we have increased the frequency of full Commission meetings and improved Commission working methods. There are significantly more cases being reviewed by the Commission and, as a result, more cases going to Tribunal. The Commission does not have the resources to allow us to participate at the same rate in all cases, regardless of their complexity or substance. Even more important, our varied participation at Tribunal is a better reflection of the unique public interest mandate the Commission has been given under the legislation.

It must also be remembered, as the Commission moves to tailor its participation at Tribunal to the degree of public interest engaged by the case in question, that the Tribunal also has the capacity to adjust its approach. Under the Canadian Human Rights Act, the Tribunal has the power, as do many administrative tribunals across Canada, to guide the identification of key issues in the case or to otherwise act in an inquisitorial manner which can be more accessible to those complainants and respondents less familiar with court process. This is in contrast to the pure adversarial model currently in place at the Tribunal, where the Commission and other parties take on the role of fully presenting the case.

To the extent possible within the current legislation, we are re-engineering the entire case management system - focussing our resources on the front end of the complaint process, making targeted interventions to reflect the public interest, maximize human rights impact and address systemic issues. We anticipate that these changes, with other management improvements and enhanced mediation services, will enable the Commission to substantially eliminate the backlog within about twenty-four months. When our new system is in place and fully functioning we will be able to monitor our progress and only then can we determine where the gaps are and where new legislation or new money might be needed.

And if new legislative amendments are indeed required to bring about fundamental change in the human rights system, we would hope that any new legislated structure would be consistent with the mediation and prevention model we have set out. A move towards a model which is more court-like and adversarial would, in our view, be a move in the wrong direction.

Our new package of reforms anticipates rebalancing the mix between mediated and traditionally-managed cases, addressing the backlog and liberating our energies and resources to focus more on systemic, egregious and high-impact human rights issues. Changing a system which has grown over twenty-five years of accumulated jurisprudence, processes and client expectations is not without risks. But it is clear that the system needs fundamental change. New human rights challenges have appeared over the past twenty-five years. Canadians place increasing demands on their public institutions to deliver results for their money and client-centred service. Human rights issues have become more

complex and require a continuum of compliance and enforcement tools to adequately respond. Our new management system is aimed at meeting all of these demands and allowing the Commission to fulfil the mandate given to it by Parliament in the Canadian Human Rights Act a quarter century ago, but in a manner which delivers results for today.

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